ORIGINAL

88-6546

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

PETITIONER'S BRIEF IN REPLY TO THE RESPONDENT'S OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

John Trebon
Arizona Bank Building
121 E. Birch Avenue, Suite 500
Flagstaff, Arizona 86001
(602) 779-1713

Counsel for Petitioner

March 23, 1989

ORIGINAL

No. 88-6546

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

NOTICE OF ERRATA

John Trebon
Arizona Bank Building
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Counsel for Petitioner

February 6, 1989

pg. 5 inserted
KE 2/14/89

Albert Duro, by and through his attorney, hereby notifies the Supreme Court and counsel for all parties that lines 1 and 2 of page 5 of the Petition for a Writ of Certiorari to the United States Supreme Court was mistakenly omitted due to a computer malfunction. Lines 1 and 2 should have read:

The majority Opinion of the Court of Appeals -- in a case of "first impression" -- brushed aside or dismissed the explicit language of several opinions . . .

An original and copies of page 5 of the petition to the United States Supreme Court, including lines 1 and 2, are also enclosed for the convenience of the Court and counsel for all parties. The attached page 5 may simply be substituted for page 5 of the original petition. We apologize for the apparent computer error that occurred in omitting lines 1 and 2 of the original petition.

Respectfully submitted,

Dated February 6, 1989

John Trebon
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Petitioner

A copy of the foregoing
was hereby mailed this
6th of February, 1989, to:

Richard B. Wilks and
Sonya M. Tablonsky
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Rodney B. Lewis
Attorney at Law
P.O. Box 400
Sacaton, Arizona

Albert Duro

By
Susan K. Eaton

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ORIGINAL

88-6546

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and states that he is a member of the Bar of the Court of Appeals for the Ninth Circuit; that on January 31, 1989, the petition for writ of certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, and with an additional copy of the petition and affidavit of mailing to counsel for respondent:

Richard B. Wilks and
Sonya M. Tablonsky
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Rodney B. Lewis
Attorney at Law
P.O.Box 400
Sacaton, Arizona

Dated at Flagstaff, Arizona, this 31st day of January, 1989.

John Trebon, Affiant

SUBSCRIBED & SWORN to before me this 31st day of January, 1989, by John Trebon.

Susan K. Eaton
Notary Public

My Commission Expires:

My Commission Expires June 5, 1992

88-6545

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ORIGINAL

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

MOTION FOR APPOINTMENT
OF COUNSEL

Albert Duro was represented by the undersigned counsel appointed pursuant to Title 18 U.S.C. Section 3006A in the Court of Appeals for the Ninth Circuit and by appointed counsel before the district court. Mr. Duro, by and through counsel, has applied to proceed before this court in forma pauperis. Mr. Duro, through counsel, also requests that the undersigned counsel be appointed to represent him in all proceedings before this Court and, in addition, requests an order appointing counsel nunc pro tunc for purposes of preparing and submitting the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: January 31, 1989

John Trebon
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

PETITIONER'S BRIEF IN REPLY TO THE
RESPONDENT'S OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI

John Trebon
Arizona Bank Building
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Counsel for Petitioner

March 23, 1989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

The petitioner, Albert Duro, by and through his attorney, submits the following brief in reply to the respondent's brief and opposition to the Petition for Writ of Certiorari.

MR. DURO IS NOT A FUGITIVE

This Court should accept jurisdiction of Mr. Duro's case based upon the reasons set forth in Mr. Duro's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

We believe that the reasons set forth by Mr. Duro in his original brief in support of the Petition for Writ of Certiorari is sufficient to overcome the respondent's brief and opposition to the Petition for Writ of Certiorari. However, one erroneous point raised by the respondent must be addressed. Contrary to the respondent's bare assertions, Mr. Duro is not a fugitive.

The respondent's assertions relating to the fugitive status of Mr. Duro are unsupported by the record in this case and are simply contrary to objective fact. Mr. Duro has never "disappeared". Instead, once he was released by order the United States District Court, he simply went home. Mr. Duro continues to reside at his residence within the State of California. He remains in contact with his attorney.

While the Court of Appeals for the Ninth Circuit has remanded Mr. Duro's case to the district court, it did not order Mr. Duro to surrender himself to the Salt River Pima-Maricopa Indian Community. Moreover, the district court has not yet acted upon Mr. Duro's case after remand. Indeed, the respondent has not requested that the district court order Mr. Duro to return.

The respondent has not even attempted to ascertain the location of Mr. Duro. Indeed, the respondent's ruthless accusations that Mr. Duro has "disappeared" or "absconded to California" or remains a "fugitive" are simply untrue.

The baseless accusations of the respondent only serve to reveal its inability to offer legitimate reasons for this Court not to accept Mr. Duro's case for review While the respondent is obviously grasping at straws to support its position before this Court, it inappropriately casts spears at Mr. Duro. Its position is unfounded.

The respondent's failure to enter into any extradition agreements with any other tribal government, such as the Cahuilla Indian Tribe, has apparently rendered it unable to summons the personal appearance of Mr. Duro from the State of California. The respondent's failure to enter into compacts or treaties with other Indian Tribes does not make Mr. Duro a fugitive. The failure of federal law to provide for extradition powers in favor of Indian Tribes does not render him a fugitive.

The respondent's position is not only erroneous as a matter of fact, but unfounded as a matter of law. In the case of Molinaro v. New Jersey, 396 U.S. 365 (1970), this Court declined to adjudicate his case AFTER HE WAS CONVICTED AND HIS BAIL WAS REVOKED FOR FAILURE TO SURRENDER TO STATE AUTHORITIES. Mr. Duro has not been convicted of any offense, he has never failed to appear for any court proceeding, and he has never failed to obey any court order relating to this case. Neither the respondent or the federal district court has set any proceeding or hearing calling for his appearance or surrender.

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction.

Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).

The majority of cases finding that the defendant was "disentitled" from seeking appellate review have relied upon the defendant's "escape" from custody after conviction. See Annotation, Effect of Escape from State Custody on Petitioner's Rights in Federal Habeas Corpus Proceedings, 61 ALR Fed. 938 (Supp. 1988). Mr. Duro has never been convicted of any offense and has never failed to abide by any court order relating to this case. He is not a fugitive from justice.

It is interesting to note that counsel for both parties have recently responded to the district court's action in setting a "status conference" by agreeing that no issues exist for resolution at the present time, including the physical custody or return of Albert Duro. See the plaintiff's "Status Report and Request to

Vacate Hearing" dated March 7, 1989, as well as, the respondent's "Request to Vacate Hearing" dated March 7, 1989, which are attached hereto and incorporated by reference in the Appendix as Exhibits "A" and "B". Mr. Duro has clearly not "disentitled" himself from review by this Court.

Respectfully submitted.

Dated: March 23, 1989

John Trebon
121 E. Birch Avenue, Suite 506
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Petitioner

APPENDIX

John Trebon
Attorney At Law
Arizona Bank Building
121 East Birch, Suite 506
Flagstaff, AZ 86001

(602) 779-1713

Attorney for Plaintiff.
AZ. State Bar No. 003575

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ALBERT DURO, Plaintiff, vs. EDWARD REINA, et. at., Defendant.	Case No. CIV-84-2187 PHX-RGS STATUS REPORT AND REQUEST TO VACATE HEARING

Albert Duro, by and through his attorney, John Trebon, requests that this Court cancel the status hearing scheduled for April 3, 1989. Counsel for Mr. Duro has recently filed a Petition for Writ of Certiorari to the Ninth Circuit with the United States Supreme Court. The respondents are currently in the process of responding to the petition for writ of certiorari.

Counsel for Mr. Duro has recently discussed the status of the case with counsel for the respondents, namely Richard Wilks, Shea and Wilks. Mr. Wilks agrees that there is no further need for a status conference at this time. There are currently no issues that need to be resolved by the district court. Indeed, counsel for both parties agree that no action should be taken by the district court with respect to the Duro case at this time.

EXHIBIT A

Therefore, we request that this court vacate the status conference scheduled for April 3, 1989, at 9:00 a.m. Moreover, please be informed that counsel for Mr. Duro, John Trebon, is scheduled to appear at three other matters within Coconino County, Arizona, on April 3, 1989. Therefore, in any event, he requests that the status conference scheduled for April 3, 1989, be cancelled or reset.

Respectfully submitted this 7 day of March, 1989.

John Trebon /KE

JOHN TREBON,
Attorney for Albert Duro

John Trebon
Attorney At Law
Arizona Bank Building
121 East Birch, Suite 506
Flagstaff, AZ 86001

A copy of the foregoing was hereby mailed this 7 of March, 1989, to:

Richard B. Wilks and
Sonya M. Tablonsky
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Albert Duro

By Sue Eaton
Susan K. Eaton

Melvin J. Mirkin, No. 765
SHEA & WILKS
114 W. Adams, #200
Phoenix, AZ 85003
(602) 257-1126

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ALBERT DURO Plaintiff, v. EDWARD REINA, et al., Defendants.	Case No. CIV-84-2107 PHX-RGS REQUEST TO VACATE HEARING

The attorneys for the defendants support plaintiff's Request to Vacate Status Hearing. If the request is denied, attorneys for defendants can appear and explain the status on behalf of both plaintiff and defendants (agreed to by telephone call from undersigned to plaintiff's attorney on March 6, 1989).

Respectfully submitted March 7, 1989.

SHEA & WILKS

By M. J. Mirkin
Melvin J. Mirkin
Attorneys for the Defendants

SHEA & WILKS
A PROFESSIONAL ASSOCIATION
114 W. ADAMS ST. SUITE 200
PHOENIX, ARIZONA 85003-2094
(602) 257-1126

COPY of the foregoing mailed March 7, 1989 to:

John Trebon
121 E. Birch, Suite 506
Flagstaff, AZ 86001
Attorney for Plaintiff

Kathleen Markowski

EXHIBIT B

SUBSCRIBED & SWORN to before me this 23 day of March, 1989, by John Trebon.

Susan K. Eaton
Notary Public

My Commission Expires:
My Commission Expires June 6, 1992

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and says that be is a member of the Bar of the Court of Appeals for the Ninth Circuit; that on March 23, 989, the Petitioner's Brief In Reply to the Respondent's Opposition to the Petition for Writ of Certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said Petitioner's Brief and Reply to the Respondent's Opposition to the Petition for Writ of Certiorari, and with an additional copy of the petition and affidavit of mailing to counsel for respondent:

Richard B. Wilks
Sonya M. Tablonsky
Melvin J. Mirkin
Shea and Wilks
114 W. Adams
Suite 200
Phoenix, Arizona 85003

Dated at Flagstaff, Arizona, this 23rd day of March, 1989.

John Trebon, Affiant

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.
CLERK OF THE COURT

AREA CODE 202
479-3011

March 21, 1989

John Trebon, Esq.
Arizona Bank Building
121 East Birch, Suite 506
Flagstaff, Arizona 86001

RE: Albert Duro v. Edward Reina, etc.,et al.
No. 88-6546

Dear Mr. Trebon:

Our records indicate that you have received a copy of the response filed by counsel for the petitioner in the above case. The Court has now directed this office to request that a reply to that response be filed.

One typewritten copy of your reply, together with proof of service thereof, should be filed to reach this office on or before Apirl 4, 1989.

Kindly acknowledge receipt of this letter on the enclosed copy.

Sincerely yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Richard B. Wilks, Esq.
Shea & Wilks
200 First Interstate Building
114 West Adams Street
Phoenix, Arizona 85003-2094

before the trial in this case. Mr. Benett has attempted to argue that this was done because, after all, we had a new bankruptcy law. Well, as Counsel are aware, the new bankruptcy law became law on July 10th; this motion was filed in September. I can go through the file and find the exact date, but as I recall it was just two or three judicial days before the trial.

. . . . . .

Therefore, *the Court must consider that the last-minute filing of these motions was in bad faith.* I think that if there's any doubt in that, it was confirmed by the fact that after this Court denied both of those motions, that the Plaintiff filed a Notice of Intent to Appeal; argued before the Court that the notice automatically stayed the trial until the District Court could resolve the matter. And as I recall—I'm probably not in a position to quote, verbatim—but *I recall making the remark to Plaintiff's Counsel that if the motion's granted, it's granted; if it's denied, it's granted if you file a Notice of Appeal. The response to that was something to the effect that, 'That's correct, Your Honor.*

. . . . . .

Clearly, the last minute attempt, if nothing else, was done in bad faith in this case; the last-minute attempts to postpone the trial, with no basis for these last-minute attempts, certainly were in bad faith.

(Transcript of Proceedings, October 29, 1984, at 45–47; Bankr. CR 84; emphasis added).

The bankruptcy court did not award the Pughs fees or costs for American's bad faith tactics, however, because it awarded the Pughs fees under ORS 743.114 of the Oregon Insurance Code.[4]

We affirm the judgment of the district court affirming the bankruptcy court's denial of American's request for a jury trial and reversing the bankruptcy court's award of fees under ORS 743.114. Because the bankruptcy court did not reach the issue of possible bad faith litigation by American, we remand to the bankruptcy court for a determination of this issue.

AFFIRMED and REMANDED.

Albert DURO, Petitioner-Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85–1718.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 8, 1985.

Decided July 9, 1987.

Nonmember Indian petitioned for writ of habeas corpus and/or writ of prohibition challenging tribal court's assertion of criminal jurisdiction. The United States District Court for the District of Arizona, William P. Copple, J., granted requested relief, and appeal was taken. The Court of Appeals, Brunetti, Circuit Judge, held that nonmember Indian was subject to criminal jurisdiction of trial court for murder of another nonmember Indian on reservation, where defendant had significant contacts with reservation.

Vacated.

Sneed, Circuit Judge, dissented and filed opinion.

4. The bankruptcy court held:

"In light of this opinion, we need not discuss nor resolve the issue raised by defendants that plaintiff has delayed and increased the costs of this litigation in bad faith."

1. Habeas Corpus ⇐113(12)

District court's decision on petition for writ of habeas corpus is reviewed de novo by Court of Appeals.

2. Indians ⇐38(2)

Nonmember Indian defendant was subject to criminal jurisdiction of tribal court for murder of another nonmember Indian on reservation, where defendant was enrolled in recognized tribe, lived on reservation with member Indian, and was employed by company owned by tribe. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5.

3. Constitutional Law ⇐223
Indians ⇐38(2)

Extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with reservation does not amount to racial classification in violation of equal protection guarantees of Indian Civil Rights Act. 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

4. Constitutional Law ⇐223
Indians ⇐38(2)

Policy of extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with reservation is reasonably related to legitimate goal of improving law enforcement on reservations, and thus did not violate equal protection guarantees of Indian Civil Rights Act. 18 U.S.C.A. §§ 1152, 1153; U.S.C.A. Const. Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1802.

Richard B. Wilka, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I.

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Relman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court

for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and removed him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the tribal court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from that judgment.

II.

STANDARD OF REVIEW

[1] Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533–34 (9th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172–73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); *see Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III.

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian*

Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them. The Court's opinion explicitly refers only to non-Indians. However, some subsequent opinions describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 173, 102 S.Ct. 894, 920, 71 L.Ed.2d 21 (1982); *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978). Other opinions describe *Oliphant*'s holding as limited to non-Indians. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853–55, 105 S.Ct. 2447, 2452–53, 85 L.Ed.2d 818 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.[1] The holdings of the cases cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. On the one hand, there are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L. Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). On the other hand, both executive and congressional pronouncements apparently use the word "Indian" to mean "tribal member," implying that non-Indians and nonmembers have the same status. *See* Comment, *Jurisdiction*

1. A similar inconsistency pervades the opinions of this court. *Compare, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) *with, e.g., United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir.1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably not nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir.1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 365, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. *See Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir.1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

over Nonmember Indians on Reservations, 1980 Ariz.St.L.J. 727, 746–48.

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.[2] *Id.* at 206, 208, 98 S.Ct. 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over non-member Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim to which we next turn. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

2. Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490–99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540–51. The third argument is not vulnerable to these attacks, which further enhances its importance.

3. The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schultz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After* Santa Clara Pueblo v. Martinez, 62 Denv. L.Rev. 761, 773–75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

4. This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. *See supra* note 3. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir.1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

B. *Equal Protection*

The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.[3] The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict scrutiny standards." We consider in turn each step of the district court's reasoning.

1. *Racial classification*

The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[4] *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federally recognized Indian tribes, which are political rather than racial groups. *See Morton v. Mancari*, 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 1290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. *See, e.g.*, 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), *cert. denied*, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

[2] In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that this is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

2. *Rational basis*

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order better to enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S.3092 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 21, 27–28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37–39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39–40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015–16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of

treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, — U.S. —, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

[3, 4] We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. *A Jurisdictional Void*

Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.[5] *See* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. *See* Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445–46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, dissenting:

I respectfully dissent. *Oliphant* should govern this case. Two commentators recently have concluded that, for purposes of determining the criminal jurisdiction of tribal courts, *Oliphant* and the history of relevant treaties and statutes suggest that nonmember Indians and non-Indians be treated the same. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1022 n. 251 (1981); *see* Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 737–49. The Supreme Court made this conclusion explicit in *United States v. Wheeler*, 435 U.S. 313, 322, 324, 326–27, 328, 98 S.Ct. 1079, 1085, 1086, 1087–88, 1088, 55 L.Ed.2d 303 (1978), by its emphasis of tribal sovereignty as the source of the tribe's criminal jurisdiction over its *members*.

Independently of these authorities, the equal protection clause of the Indian Civil Rights Act requires affirmance of the district court. To embrace the differential treatment of non-Indians and nonmember Indians within the context of this case is to employ a classification based upon race. It is true that special treatment of Indians in many situations has not been treated as being based on race but rather on the unique sovereignty of Indian Tribes. *See United States v. Antelope*, 430 U.S. 641, 645–47, 97 S.Ct. 1395, 1398–99, 51 L.Ed.2d 701 (1977). That sovereignty provides no proper basis for depriving a nonmember Indian of an immunity from tribal jurisdiction enjoyed by a non-Indian. Neither does the fact that the determination of who is an Indian sometimes involves factors other than race.

Laws based on racial classifications are subject to strict scrutiny. Extending tribal court criminal jurisdiction to nonmember Indians might incrementally aid law enforcement on reservations. But then so might its extension to non-Indians. However, clearly these extensions are not necessary to achieve a compelling governmental interest. Therefore it fails the applicable equal protection test.

Different tribes do things differently. Indian law traditionally respects the tribes' individuality. *See* Clinton, *supra*, at 984–91. Limiting a tribal court's criminal jurisdiction to members of its own tribe is quite consistent with the self-determination of Indian tribes. To bar its extension to nonmember Indians does not significantly impair tribal self-determination.

5. Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. *See United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 524–26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Roscoe L. LITTLEFIELD,
Defendant-Appellee.

No. 86-1160.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 12, 1987.
Decided July 10, 1987.

Government sought forfeiture of owner's property on which marijuana allegedly was grown. The United States District Court for the Northern District of California, William H. Orrick, Jr., J., determined that forfeiture was authorized only for those persons of property actually used or intended to be used to grow marijuana, and Government appealed. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) owners alleged use of portion of 40-acre parcel of property to grow marijuana subjected entire parcel to forfeiture, but (2) before entering order of forfeiture, district court was required to determine that forfeiture of entire property together with other punishments imposed was not so disproportionate to offense committed as to violate Eighth Amendment.

Reversed and remanded.

1. Drugs and Narcotics ⇐191

By specifying that property is subject to forfeiture if used in "any manner or

is whether Haberkorn has a legitimate expectation of privacy in the storage unit.

Neither ownership nor presence are required to assert a reasonable expectation of privacy under the Fourth Amendment. A "formalized arrangement among defendants indicating joint control and supervision of the place is sufficient to support a legitimate expectation of privacy." *United States v. Broadhurst*, 805 F.2d 849, 851–52 (9th Cir.1986). If the record "amply indicates a formalized, ongoing arrangement" between the defendants for the storage of chemicals in the storage unit, *id.* at 852, Haberkorn had a reasonable expectation of privacy in the unit. In several cases this court has found that participation in an arrangement that indicates joint control and supervision of the place searched is enough to establish a Fourth Amendment protected privacy interest. *See United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984), *cert. dismissed*, 475 U.S. 791, 106 S.Ct. 1623, 89 L.Ed.2d 803 (1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984); *United States v. Johns*, 707 F.2d 1093 (9th Cir.1983), *rev'd on other grounds*, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).

In the instant case, the indictments charged the defendants with criminal conspiracy as to all the substantive crimes involving the manufacture and possession of the drugs. An affidavit submitted by Haberkorn alleged that he was the co-owner of the chemicals found in the storage unit and the payor of a portion of the rental payments made with respect to the unit. We have before us no other relevant documents.

We are unable to determine on what grounds the district court decided that Haberkorn had no standing. The government in its brief, however, states that for the "purposes of appeal" it does not contest Haberkorn's standing to contest the search. Brief of Appellee United States at 12. Although the indictments and Haberkorn's affidavit do not rise to the level of "stipulated facts," as in *Pollock, supra*, these documents do indicate that Johns and Haberkorn were engaged in a joint venture of some sort at the location of the surreptitious search. Therefore we conclude that Haberkorn has standing to assert his right to any hearing on the admission of evidence relating to the search of the Unit 39 storage space.

REVERSED and REMANDED.

NOONAN, Circuit Judge, concurring in part and dissenting in part:

I concur except as to the last paragraph. I would remand to the district court to determine whether Haberkorn has standing under the standards we are enunciating.

Albert DURO, Petitioner–Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima–Maricopa Indian Community, et al., Respondents–Appellants.

No. 85–1718.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 8, 1985.

Decided July 9, 1987.

As Amended June 29, 1988.

Nonmember Indian sought writ of habeas corpus and writ of prohibition challenging trial court's assertion of criminal jurisdiction over crime against nonmember Indian on reservation. The United States District Court for the District of Arizona, William P. Copple, J., granted relief. Appeal was taken. The Court of Appeals, Brunetti, Circuit Judge, held that tribal court had jurisdiction over nonmember Indian who killed nonmember Indian on reservation.

Vacated and remanded.

Sneed, Circuit Judge dissented and filed opinion.

Opinion superseded, 821 F.2d 1358.

1. **Habeas Corpus ⇐113(12)**

District court's decision on petition for writ of habeas corpus is reviewed de novo by Court of Appeals.

2. **Federal Courts ⇐813**

District court's decision to issue writ of prohibition is reviewed for abuse of discretion.

3. **Habeas Corpus ⇐45(3)**

Habeas corpus statute gave district court jurisdiction over Indian's petition to challenge criminal jurisdiction of tribal court, and, thus, court could issue auxiliary writs in aid of its jurisdiction in its sound judgment. 28 U.S.C.A. § 2241(c)(1, 3).

4. **Indians ⇐32(13)**

Tribal court had criminal jurisdiction over nonmember Indian who allegedly killed nonmember Indian on reservation and had criminal jurisdiction over crimes committed by Indians against Indians without regard to tribal membership. 18 U.S.C.A. §§ 1111, 1151 et seq., 1152, 1153; Klamath Termination Act, § 1 et seq., 25 U.S.C.A. § 564 et seq.

5. **Indians ⇐36**

Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under statute governing applicability to Indian country of criminal laws applicable in areas of exclusive federal jurisdiction. 18 U.S.C.A. § 1152.

6. **Constitutional Law ⇐82(2), 210(1)**
Indians ⇐32(4)

Neither bill of rights nor Fourteenth Amendment limits authority of Indian tribes. U.S.C.A. Const.Amend. 14.

7. **Indians ⇐32(5)**

Equal protection provision of Indian Civil Rights Act extends to any person, even non-Indian, within jurisdiction of tribe. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

8. **Indians ⇐32(5)**

Equal protection standard of Indian Civil Rights Act is no more vigorous than Fifth Amendment counterpart. U.S.C.A. Const.Amend. 5; Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302.

9. **Indians ⇐1**

Members of terminated tribes do not qualify as Indians regardless of their race. 18 U.S.C.A. §§ 1152, 1153.

10. **Indians ⇐1**

Enrolled members of tribes qualify as Indians if there is some evidence of affiliation, such as residence on reservation and association with other enrolled members. 18 U.S.C.A. §§ 1152, 1153.

11. **Indians ⇐1**

Person of mixed blood who is enrolled in recognized tribe or otherwise affiliated with it may be treated as Indian. 18 U.S.C.A. §§ 1152, 1153.

12. **Indians ⇐32(13)**

Tribal courts may define criminal jurisdiction according to complex notion of who is Indian according to totality of circumstances, including genealogy, group identification, and life-style. 18 U.S.C.A. §§ 1152, 1153.

13. **Indians ⇐32(13)**

Nonmember Indian's contacts justified tribal court's conclusion that nonmember Indian was Indian subject to its criminal jurisdiction; Indian was enrolled in recognized tribe, was closely associated with court's tribe through his girl friend, a tribal member, his residence with her family on reservation, and his employment with company owned by tribe.

14. **Constitutional Law ⇐223**
Indians ⇐32(13)

Extending tribal court criminal jurisdiction to nonmember Indians with significant contact with reservation does not amount to racial classification for purposes of equal protection guarantee of Indian Civil Rights Act. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; U.S.C.A. Const. Amends. 5, 14.

15. Constitutional Law ⇐223
Indians ⇐32(13)

Extending tribal court criminal jurisdiction to nonmember Indian was reasonably related to legitimate goal of improving law enforcement on reservation and did not violate equal protection guarantee of Indian Civil Rights Act. Civil Rights Act of 1968, § 202, 25 U.S.C.A. § 1302; U.S.C.A. Const.Amends. 5, 14.

16. Indians ⇐38(2)

Federal court would have no criminal jurisdiction over nonmember Indian who shot nonmember Indian on reservation, if courts treat defendant and victim as non-Indians. 18 U.S.C.A. §§ 13, 1152, 1153.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The question before us is whether an Indian may be subject to the criminal jurisdiction of the court of a tribe of which neither he nor his victim was a member. The district court ordered officials of an Indian tribe to discharge appellee from custody and to abstain from further criminal prosecution. We conclude that the tribe properly asserted criminal jurisdiction over appellee because he is an Indian, albeit an Indian enrolled in a different tribe. We therefore vacate and remand.

I

FACTS AND PROCEEDINGS BELOW

Appellee Albert Duro, petitioner below, is an enrolled member of the Torrez-Martinez band of Mission Indians. Duro was born in Riverside, California. He has lived all but one year of his life outside of his tribal reservation. From approximately March 1984 to approximately June 15, 1984, Duro resided within the Salt River Indian Reservation (Reservation). During this time, Duro lived with his girlfriend in her family home. His girlfriend is a member of the Salt River Pima-Maricopa Indian Community (Community or tribe). Duro worked for the PiCopa Construction Company. The Community owns the company. However, the company does not require its employees either to reside within the Reservation or to be members of the Community.

The Community is a federally recognized tribal entity that exercises authority over the Reservation. Duro is not eligible for membership in the Community. Appellant Edward Reina, respondent below, is Chief of Police of the Community's Department of Public Safety. Appellant the Honorable Reiman R. Manuel, Sr., respondent below, is Chief Judge of the Indian Community Court (tribal court).

On June 18, 1984, criminal complaints against Duro were filed in both the tribal court and the United States District Court for the District of Arizona. The tribal court complaint charged Duro with discharge of a firearm within the boundaries of the Reservation, which violates the Community's Code of Misdemeanors. The district court complaint charged Duro with murder and aiding and abetting murder, which violates 18 U.S.C. §§ 2, 1111, and 1153. The complaints pertained to the same event. On or about June 15, 1984, Duro allegedly shot Phillip Fernando Brown, a fourteen year old boy, and killed him. Brown was an enrolled member of the Gila River Indian Tribe, which resides on a separate reservation.

Federal agents arrested Duro near his home in California on June 19 and moved him to the District of Arizona. On July 25, a grand jury indicted Duro for first degree murder. The district court dismissed the indictment without prejudice on the motion of the United States. Duro was then placed in the custody of the Salt River Department of Public Safety. On October 19, the trial court denied Duro's motion to dismiss for lack of criminal jurisdiction. Duro petitioned the district court for a writ of habeas corpus and/or a writ of prohibition. The court granted the requested relief on January 14, 1985. Appellants timely appealed from the judgment.

II

STANDARD OF REVIEW

[1-3] Our review of a district court's decision on a petition for a writ of habeas corpus is de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir.), *cert. denied*, 474 U.S. 841, 106 S.Ct. 124, 88 L.Ed.2d 101 (1985). We review for an abuse of discretion the district court's decision to issue a writ of prohibition. The district court had jurisdiction over this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1) & (3). Therefore the court could issue auxiliary writs in aid of its jurisdiction "in its sound judgment," within the limits set by Congress. *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942)); *see Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir.1972).

III

DISCUSSION

This case brings before us an issue of first impression: whether the criminal jurisdiction of a tribal court extends to an Indian who is not a member of the tribe, if he is accused of committing an offense against another nonmember Indian on the tribe's reservation. This issue concerns one of the uncharted reaches of tribal jurisdiction and presents a troubling choice between recognizing new restrictions on tribal sovereignty on the one hand, and placing an additional jurisdictional liability upon Indians not members of the tribe whose jurisdiction is in question.

In resolving questions of tribal sovereignty, we ordinarily are guided by those tribal powers historically exercised, the will of Congress as expressed in treaty and statute, and a considerable body of decisional law. Such sources, however, are of little aid in resolving the present controversy. The exercise of tribal criminal jurisdiction over nonmember Indians is virtually without historical precedent. This is not because such power did not theoretically reside in the tribes, but rather because circumstances, for other reasons, did not give rise to its exercise. The circumstances giving rise to the instant case have their roots in the present displacement of many Indian tribes, the resultant heterogeneity of present day reservation populations, and the increasing prevalence and sophistication of tribal courts. Our reliance in turn on statute and case law is restrained by the indiscriminate use by Congress and the courts of the terms "Indian" and "non-Indian"—"Indian" frequently has been used to denote "tribal member," while "non-Indian" has served as a synonym for "nonmember." Having acknowledged the complexity and moment of the question before us, we turn to its resolution.

A. *Oliphant v. Suquamish Indian Tribe*

At the outset we face the question of whether *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978), controls this case. In that case, two non-Indians were charged with committing crimes on a reservation. The Supreme Court ruled that the tribal court did not have criminal jurisdiction over them.[1] The Court's opinion explicitly re-

1. In a recent decision, *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988), the Eighth Circuit concluded that the Devils Lake Sioux Tribal Court did not have criminal jurisdiction over nonmembers of the Devils Lake Sioux Tribe.

The Eighth Circuit acknowledged that the Supreme Court in *Oliphant* held that the Suquamish Tribal Court lacked authority to exercise criminal jurisdiction over non-Indians and that Congress had not explicitly terminated the Devils Lake Sioux Tribe's authority to prosecute nonmember Indians. *Greywater* acknowledges that 18 U.S.C. § 1152 may seem to indicate that Congress' use of the term "Indian" was meant to include all Indians regardless of tribal affiliation and while acknowledging the sovereign

fers only to non-Indians. The Court never used the term "nonmember." However, the Supreme Court in one subsequent dissent and one subsequent opinion describe *Oliphant* as excluding nonmember Indians as well from the criminal jurisdiction of the tribal courts. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-3, 102 S.Ct. 894, 919-20, 71 L.Ed.2d 21, 50-52 (1982) (Stevens, J. dissenting). This case only concerned the Indian tribe's authority to impose a mining severance tax on *non-Indians* who were mining on the reservation. The majority opinion on occasion, and for no apparent reason, uses the term "nonmember" when discussing the power of the tribe to tax "non-Indians." *Id.*, 102 S.Ct. at 903-5. This change in terms has no relevance to the decision. It is clear that the Court is discussing the tribe's authority to tax "non-Indian" miners not "nonmembers."

Justice Stevens' dissent in addressing the authority of the tribe to tax the non-Indian lessees who produce oil and gas from within the tribe's reservation in dicta miscasts *Oliphant* as holding that tribes "have no criminal jurisdiction over crimes committed by nonmembers within the reservation." *Id.* at 919. In his analysis of the power of the tribe to tax, Justice Stevens interchanges the terms "nonmember" and "non-Indian." The majority rejected his analysis that the power of an Indian tribe to exclude nonmembers was the basis for imposing a tax on the nonmembers, *Id.* at 903, 919-920.

In *United States v. Wheeler*, 435 U.S. 313, 326, 98 S.Ct. 1079, 1087, 55 L.Ed.2d 303 (1978), Justice Stewart in dictum stated that *Oliphant* stands for the proposition that nonmembers cannot be tried in tribal courts. The term "nonmember" was used throughout the *Wheeler* opinion, however, nonmember status was not in issue as Wheeler was a member of the Navajo tribe, who was tried by the Navajo tribal court for a Navajo tribal code violation. At issue was not the jurisdiction of tribal courts but the possible double jeopardy effect of a prior tribal court conviction in a federal rape prosecution. The indiscriminate use of the term "nonmember" throughout the *Wheeler* opinion, 435 U.S. at 322-28, 98 S.Ct. at 1085-89, amplifies the point that Justice Stewart's statement is merely dictum. To the contrary two other Supreme Court opinions describe *Oliphant's* holding as limited to non-Indians. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-55, 105 S.Ct. 2447, 2452-53, 85 L.Ed.2d 818 (1985) (tribal court power to exercise civil subject matter jurisdiction over non-Indians); *Washington v. Confederated Tribes*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980).[3]

It appears that the Court has not used the terms non-Indian and nonmember Indian precisely.[3] The holdings of the cases

power of tribes to punish offenses against tribal law by members of a tribe found that federal preemption of a tribe's jurisdiction to punish its members for infraction of tribal law would detract substantially from tribal self-government. However, the Eighth Circuit ultimately found that the Devils Lake Sioux Tribe's exercise of criminal jurisdiction over nonmember Indians is beyond what is necessary to protect the rights essential to the tribe's self-government and is inconsistent with the overriding interest of the federal government in ensuring that its citizens are protected from unwarranted intrusions upon their personal liberty. For the reasons expressed in this amended opinion, we do not find the Eighth Circuit's reasoning persuasive.

2. A review of several of the authorities cited in the *Oliphant* opinion fortifies the point that its application is limited to the lack of tribal court criminal jurisdiction over non-Indians not nonmember Indians. E.g. *Ex Parte Kenyon*, 14 F.Cas. 353 (W.D.Ark.1878) ("[p]etitioner was born of white parents, had left his domicile in the Indian county and gained domicile in the state of Kansas."); 2 Op.Atty.Gen. 693 (1834) (Attorney General concludes that the Choctaw tribal courts have no jurisdiction over white citizens nor over Negro slaves owned by white citizens.); *Criminal Jurisdiction of Indian Tribes Over Non-Indians*, 77 I.D. 113 (1970) (Solicitor General of the Department of Interior concludes that Indian tribes do not possess criminal jurisdiction over non-Indians).

3. A similar inconsistency pervades the opinions of this court. *Compare, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (tribes lack inherent power to punish non-Indians for criminal acts, but presumably have that power with regard to nonmember Indians) *with, e.g., United States v. Johnson*, 637 F.2d 1224, 1230 (9th Cir.1980) (inherent tribal sovereignty includes power to punish "tribal offenders," but presumably not nonmember Indians, for violation of criminal laws). Indeed, individual opinions are internally inconsistent on this point. *See Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 596 n. 9, 598 (9th Cir.1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.) (*Oliphant* eliminates criminal jurisdiction only over non-Indians; yet, if extended to civil cases, it would "eliminate altogether any tribal jurisdiction over persons not members of the tribe"), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982). Authors of earlier opinions might have used "nonmember Indian" and "non-Indian" as synonyms. At a minimum, they did not distinguish carefully between the two categories. Therefore these opinions are not helpful in resolving this case, in which the distinction between nonmember Indian and non-Indian is crucial. *See Williams v. Clark*, 742 F.2d 549, 555 n. 7 (9th Cir.1984) (whether a tribe may exercise criminal jurisdiction over nonmembers is an open question), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

4. *See* Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 Ariz.St.L.J. 727, 746-48.

The comment only postulates that nonmember Indians and non-Indians be treated the same. The comment acknowledges that changes in Indian treaty provisions in the 18th and early 19th centuries make Congress' intent uncertain on the issue of federal versus tribal criminal jurisdiction. These language changes might indicate, the comment suggests:

"[T]hat Congress meant to assume federal jurisdiction over offenses between nonmember Indians and tribal members in the same manner it had previously assumed federal jurisdiction over offenses between non-Indians and tribal members. *On the other hand* Congress may have intended the change of language to merely reflect the applicability of a treaty to only the signatory tribes." *Id.* at 738 (emphasis added).

At the same time the comment proposes that by examining treaty provisions, the intent of Congress to assume jurisdiction over nonmember Indians is made clear. Yet later the author, examining federal statutes (25 U.S.C. §§ 1321, 1322 and 1326) states that Indian and nonmember Indians can only be implicitly equated.

The problem is that it is indeed too difficult to get a finger on the pulse of Congress' intent in this area. Absent an express Congressional assumption of jurisdiction we feel safe in concluding that tribal courts retain criminal jurisdiction in these situations.

As for *Oliphant*, the comment acknowledged several times that it is limited to non-Indians.

cited do not depend on making that distinction with regard to *Oliphant*. We give little weight to these casual references. Certainly we will not extend the literal holding in *Oliphant* on the basis of them alone.

We turn next to the reasoning in *Oliphant* to determine whether the holding extends to nonmember Indians as well as to non-Indians. The tribal court traced its authority to try non-Indians to the tribe's retained inherent powers of government over the reservation. 435 U.S. at 196, 98 S.Ct. at 1014. The Court rejected this argument. First, it identified a historical shared presumption on the part of Congress, the executive branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. Second, it examined the particular treaty signed by the Suquamish for indications that the tribe had ceded criminal jurisdiction to the federal government. Finally, it determined in the light of precedent that the exercise of criminal jurisdiction would be inconsistent with the tribe's dependent status.

Applying the *Oliphant* analysis to Duro's case, we note first that the historical evidence is equivocal on the question of whether tribal court jurisdiction extends to nonmember Indians. There are indications that the executive branch and courts assumed that tribal courts may try crimes committed by any Indian, whether or not he is a tribe member. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 479 n. 5 (1979) (citing 25 C.F.R. § 11.2(c) (1978); *United States v. Burland*, 441 F.2d 1199, 1200 n. 1 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970)). One commentator has implied that non-Indians and nonmembers have the same status. The implication was derived from an analysis of statutes that allow states to assume criminal and civil jurisdiction over Indian country with the consent of the tribe occupying the particular Indian country. 25 U.S.C. §§ 1321, 1322 and 1326. We do not agree with that implication.[4]

Perplexed by these ambiguities in the historical record, we turn to the Court's third argument in *Oliphant*. "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." 435 U.S. at 210, 98 S.Ct. at 1021. This overriding sovereignty argument was the core of the Court's opinion.[5] *Id.* at 206, 208, 98 S.Ct. at 1019, 1020 (explaining the lesser importance of the other arguments). At first blush, the theory of overriding sovereignty appears to limit the jurisdiction of tribal courts only with respect to non-Indians, to whom the tribes originally submitted. Tribal courts would retain jurisdiction over nonmember Indians. However, all Indians are now United States citizens. 8 U.S.C. § 1401(a)(2). As citizens, Indians as well as non-Indians can claim to be exempt from the criminal jurisdiction of tribes, which are sovereign entities subordinate to the United States. This suggests an equal protection claim which we address later. It is evident, however, that the reasoning of *Oliphant*, like its language, does not dispose of this case.

Rather, what is more dispositive of this case is the federal criminal statutory scheme[6] and its treatment of crimes committed by Indians. 18 U.S.C. § 1151, et seq.

[4] That statutory scheme subjects individuals to federal prosecution "by virtue of their status as Indians." *United States v. Antelope*, 430 U.S. 641, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977). For purposes of the federal criminal statutes the important inquiry is whether a particular defendant is a member of a tribe that has a special relationship with the federal government, not whether the defendant happens to have a relationship with the tribe governing the reservation where the offense occurred. Accordingly, in *United States v. Heath*, 509 F.2d 16 (9th Cir.1974) we held that a Klamath Indian whose tribe had been federally "terminated" could not be federally prosecuted for a violation of 18 U.S.C. §§ 1111 and 1153 for killing an enrolled member of the Warm Springs Indian Tribe on the Warm Springs Reservation. The reason was the absence of a federal relationship between the Klamaths and the United States as a result of the termination of federal supervision over the Klamath Tribe by the Klamath Termination Act, 25 U.S.C. § 564 et seq. *Id.* at 19. Under 18 U.S.C. § 1153 jurisdiction is based upon a crime committed by one Indian against another Indian within the Indian country. It was not suggested that federal jurisdiction was lacking because the Klamath was on the reservation of the Warm Springs Tribe, where she enjoyed no tribal relationship.

Granted, the discussion so far has been concerned with federal jurisdiction and not tribal. However, it cannot be ignored that the two are interwoven. Thus in *Arizona ex rel Merrill v. Turtle, supra*, we held that Navajo tribal sovereignty precluded Arizona from arresting a Cheyenne Indian on the Navajo Reservation for the purpose of extraditing him to Oklahoma. We recognized, by analyzing the terms of the Treaty of 1868 between the Navajos and the United States that a tribe has the right to exercise power over the Indian residents of its reservation, without distinction as to

5. Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. Collins, *supra*, at 490–99; Note, *Indians—Jurisdiction—Tribal Courts Lack Jurisdiction over Non-Indian Offenders*, 1979 Wis.L.Rev. 537, 540–51. The third argument is not vulnerable to these attacks, which further enhances its importance.

6. In addition to the statutory scheme, the regulatory scheme promulgated by the Department of Interior's Bureau of Indian Affairs establishing Courts of Indian Offenses states that those courts "shall have jurisdiction over all offenses ... when committed by *any* Indian, within the reservation or reservations for which the court is established ..." 25 C.F.R. § 11.2(a) (1987) (emphasis added). We find it instructive that the regulations fail to limit jurisdiction of these courts only to offenses committed by Indians of the tribe for which the particular court is established. (The regulations deem an Indian, for purposes of these courts "to be *any* person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction." 25 C.F.R. § 11.2(c) (1987). There is no distinction made as to the status of nonmember Indians.)

whether the Indian was a member of the tribe or not. *Id.* at 686.

The structure of criminal jurisdiction in Indian country, as far as it relevant here, is easily discerned. Tribal courts generally handle petty crimes by Indians against Indians and victimless crimes by Indians. However, certain "major" crimes by Indians are dealt with in federal court pursuant to the Major Crimes Act, 18 U.S.C. § 1153. That statute punishes "Indians" who commit crimes in Indian country. That usually means that the crime is committed on some tribe's reservation "and the fair inference is that the offending Indian shall belong to *that or some other tribe* ... [the statute's] effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." *United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886) (emphasis added). The statute has *never* been restricted in its application to Indians who are members of the "host" tribe.

[5] Crimes by Indians against non-Indians and crimes by non-Indians against Indians are punishable under 18 U.S.C. § 1152. That statute makes applicable in Indian country those criminal laws applicable in areas of exclusive federal jurisdiction with several exceptions.[7]

As 18 U.S.C. § 1152 has been applied it has also been assumed that references to "Indian" meant any Indian not just Indians who were members of the host tribe. In *United States v. Burland*, 441 F.2d 1199 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971) we applied the statute to a member of the Confederated Salish and Kootenai Tribes who committed a crime on the Flathead Reservation. We noted, citing *Kagama, supra*, that Burland did not argue "that the statute was inapplicable to him because he was a member of a tribe other than the local tribe and was visiting from another reservation." *Id.* at 1200, n. 1.

Furthermore, in discussing the Major Crimes Act, we held in *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980) that except for the crimes specifically enumerated in the Act, "the general rule is that tribal courts have retained exclusive jurisdiction over all crimes committed by Indians against other Indians in Indian country." *Id.* at 1231. Again we declined to make a distinction between member and nonmember Indians.

The cases discussing the federal criminal statutory scheme clearly indicate that if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so. Absent such divestment it is reasonable to conclude that tribal courts retain jurisdiction over crimes committed by Indians against other Indians without regard to tribal membership.

B. *Equal Protection*

[6, 7] The district court ruled that the tribe's exercise of criminal jurisdiction over Duro denied him the equal protection of its laws in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302.[8] The court said that the distinction between nonmember Indians and non-Indians "is based solely upon race." It recognized that racial classifications ordinarily must withstand strict scrutiny. Finally, it concluded that "[t]he discriminatory enforcement of tribal criminal jurisdiction in this case cannot be upheld under either the rational basis or strict

7. The statute does not apply to offenses committed by one Indian against the person or property of another Indian, nor to an Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case whereby treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

8. The Indian Civil Rights Act is the sole source of Duro's equal protection claim. Neither the Bill of Rights nor the Fourteenth Amendment limits the authority of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). The equal protection provision of the Act extends to any person, even a non-Indian, within the jurisdiction of the tribe. Schulz, *The Federal Due Process and Equal Protection Rights of Non-Indian Civil Litigants in Tribal Courts After Santa Clara Pueblo v. Martinez*, 62 Denv.L.Rev. 761, 773–75 (1985). Therefore Duro may invoke it despite his status as a nonmember.

scrutiny standards." We consider in turn each step of the district court's reasoning.

1. *Racial classification*

[8] The Supreme Court has made clear that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[9] *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977). The district court accepted this proposition with respect to legislation concerning federal recognized Indian tribes, which are political rather than racial groups. *See Morton v. Mancari*, 417 U.S. 535, 553, n. 24, 94 S.Ct. 2474, 2484, n. 24, 41 L.Ed.2d 290 (1974). Therefore the district court recognized that tribal courts may exercise criminal jurisdiction over member Indians even though non-Indians are exempt. However, it viewed the extension of tribal court criminal jurisdiction to nonmember Indians as based on race alone.

[9–12] The district court erroneously assumed that tribal courts extend their criminal jurisdiction to Indians on the basis of race. Who is an Indian turns on numerous facts of which race is only one, albeit an important one. The criminal jurisdiction of federal courts also turns, in part, on who is an Indian. *See, e.g.*, 18 U.S.C. §§ 1152, 1153. Federal courts identify Indians by reference to an individual's degree of Indian blood and his tribal or governmental recognition as an Indian. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). Members of terminated tribes do not qualify as Indians, regardless of their race. *United States v. Heath*, 509 F.2d 16, 19 (9th Cir.1974). Enrolled members of tribes qualify as Indians if there is some other evidence of affiliation, such as residence on a reservation and association with other enrolled members. *United States v. Indian Boy X*, 565 F.2d 585, 594 (9th Cir.1977), *cert. denied*, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978). A person of mixed blood who is enrolled in a recognized tribe or otherwise affiliated with it may be treated as an Indian. *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir.1938), *cert. denied*, 306 U.S. 643, 59 S.Ct. 581, 83 L.Ed. 1043 (1939); R. Flowers, *Criminal Jurisdiction Allocation in Indian Country* 6 (1983). For the purpose of federal jurisdiction, Indian status is "based on a totality of circumstances, including genealogy, group identification, and lifestyle, in which no one factor is dispositive." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 518 (1976). Tribal courts may define their criminal jurisdiction according to a similarly complex notion of who is an Indian.

[13] In this case, Duro is enrolled in a recognized tribe, although not in the Community. He was closely associated with the Community through his girlfriend, a Community member, his residence with her family on the Reservation, and his employment with the PiCopa Construction Company. These contacts justify the tribal court's conclusion that Duro is an Indian subject to its criminal jurisdiction. We stress that his is not purely a racial determination. Indeed, the record does not describe Duro's ancestry, so we do not know his degree of Indian blood.

9. This case does not concern federal legislation, but rather the tribe's exercise of its retained sovereign powers. Therefore the equal protection standard of the Indian Civil Rights Act applies, not the implicit equal protection requirement of the Fifth Amendment. *See supra* note 8. We are satisfied that the equal protection standard of the Indian Civil Rights Act is no more rigorous than its Fifth Amendment counterpart. The Indian Civil Rights Act "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63, 98 S.Ct. 1670, 1679, 56 L.Ed.2d 106 (1978). Congress intended to foster tribal self-determination as well as to protect individual rights. *Id.* at 62, 98 S.Ct. at 1679. If Congress altered the constitutional equal protection standard at all, it diluted it. *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir.1976). Our argument that the tribal court's assertion of criminal jurisdiction is valid under the implicit equal protection guarantee of the Fifth Amendment necessarily implies that it is valid under the equal protection guarantee of the Indian Civil Rights Act.

2. *Rational basis*

The Community wishes to extend the tribal court's criminal jurisdiction to nonmember Indians in order to better enforce the law on the Reservation. Federal prosecution of crimes on reservations has long been inadequate. *Jurisdiction on Indian Reservations, Hearing on S. 3092 Before the Senate Select Comm. on Indian Affairs*, 98 Cong., 2d Sess. 21, 27–28 (1985) (statements of Caleb Shields, Councilman, Assiniboine & Sioux Tribes, Fort Peck Reservation, Montana, and James C. Nelson, County Attorney, Glacier County, Montana); American Indian Policy Review Comm'n, *Report on Federal, State, and Tribal Jurisdiction* 37–39 (1976). Law enforcement by state officials is also undependable, American Indian Policy Review Comm'n, *supra*, at 39–40, in part because of jurisdictional uncertainties that will be discussed in the next subsection. Furthermore, treating nonmember Indians resident on the reservation differently from member residents undermines the tribal community. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan.L.Rev. 979, 1015–16 (1981) (criticizing treating members and nonmembers differently with regard to state taxes because it fragments the tribal community).

The district court recognized that tribal court jurisdiction over nonmember Indians would strengthen tribal authority over the reservation. But it thought this consideration was outweighed by the injustice of treating nonmember Indians differently from non-Indians. Neither nonmember Indians nor non-Indians may participate in tribal government. However, as explained above in the discussion of *Oliphant*, the Supreme Court did not exempt non-Indians from the criminal jurisdiction of tribal courts on the ground that they are excluded from tribal government. Had that been the case, non-Indians presumably would be exempt from the civil jurisdiction of tribal courts. That is not the case, however. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed.2d 251 (1959).

[14, 15] We conclude that extending tribal court criminal jurisdiction to nonmember Indians who have significant contacts with a reservation does not amount to a racial classification. We further find that this policy is reasonably related to the legitimate goal of improving law enforcement on reservations. The district court's decision was in error.

C. *A Jurisdictional Void*

[16] Our conclusion is strengthened when we consider what would happen if we ruled that Duro is exempt from tribal court criminal jurisdiction. Duro argues that because neither he nor his supposed victim was a member of the Community, they must both be treated like non-Indians for the purpose of criminal jurisdiction. Thus only a state court could have jurisdiction over Duro.[10] *See* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 388 (1979) (citing *United States v. McBratney*, 104 U.S. (14

10. Duro's reasoning precludes federal, as well as tribal, jurisdiction over his case. Federal courts have jurisdiction over Indian defendants accused of committing enumerated major crimes against non-Indians. 18 U.S.C. § 1153. It is not clear whether federal jurisdiction preempts tribal jurisdiction over these cases. *See United States v. John*, 437 U.S. 634, 651 n. 21, 98 S.Ct. 2541, 2550, n. 21, 57 L.Ed.2d 489 (1978). Lesser crimes committed by Indians against non-Indians, as well as all crimes committed by non-Indians against Indians, are punishable under 18 U.S.C. § 1152. That section extends federal enclave law to Indian country, although not to offenses committed by an Indian against another Indian, nor to any Indian who has already been punished under tribal law. Under the Assimilative Crimes Act, 18 U.S.C. § 13, federal enclave law incorporates local state law where federal law defines no equivalent offense. *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962 (1946). However, as explained in the text, the courts have created an exception from federal jurisdiction for crimes committed between non-Indians, and "it appears to be too well entrenched to be overruled." Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 524–26 (1976). Therefore if courts treat Duro and his victim as non-Indians, there will be no federal criminal jurisdiction over his case.

Otto) 621, 26 L.Ed. 869 (1882)). The flaw in Duro's analysis is that state courts apparently do not exercise their criminal jurisdiction as Duro recommends. Notably, the record in this case shows no attempt to prosecute Duro in state court. At least one state court has held that it lacked jurisdiction over an Indian who allegedly committed a crime on a reservation, even though the Indian was not a member of the reservation tribe. *State v. Allan*, 100 Idaho 918, 921, 607 P.2d 426, 429 (1980). If no state court takes jurisdiction of Duro's case, there will be a jurisdiction void.

It is possible that state courts will henceforth extend their criminal jurisdiction to cases involving nonmember Indians such as Duro. But increasing state authority in Indian reservations has its own disadvantages. *See* Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L.Rev. 434, 445–46 (1981) (criticizing the extension of state authority into Indian country as inconsistent with constitutional history and needlessly complex). We are fortunate to be able to avoid this dilemma.

We conclude that the tribal court had criminal jurisdiction over Duro. The district court erred in granting a writ of habeas corpus. Consequently it abused its discretion by issuing a writ of prohibition in aid thereof.

VACATED.

SNEED, Circuit Judge, Dissenting:

The majority has substantially revised its opinion since it first appeared at 821 F.2d 1358–64 (9th Cir.1987). It is, therefore, appropriate that my dissent be revised, particularly in light of the fact that the intervening deliberations have provided to me additional insights that have strengthened my resolve to dissent.

In my original dissent, I stated "*Oliphant* should govern this case." *Id.* at 1364. That remains true, but now I am more ready to concede that it need not. The underpinning of its holding was the history of the relationship between the United States and Indian tribes generally and the Suquamish Tribe in particular. Emphasis was placed upon the fact that the tribes seldom, if ever, exercised criminal jurisdiction over non-Indians prior to the middle of this century. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196–97, 98 S.Ct. 1011, 1014–15, 55 L.Ed.2d 209 (1978). The same undoubtedly cannot be said with respect to the exercise of criminal jurisdiction over Indians not members of the adjudicating tribe. Therefore, I concede that the *ratio decidendi* of *Oliphant* is not applicable to this case.

Nonetheless, *Oliphant* exists. Its holding that neither the existing residual tribal sovereignty nor a grant of power by Congress authorized the exercise of criminal jurisdiction by a tribe over a non-Indian leaves open the question whether either supports the exercise of such jurisdiction over a nonmember Indian. I believe neither does. My reasons, succinctly stated, are as follows:

(1) *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), makes clear that retained tribal sovereignty exists to govern the behavior of tribal members. No necessity exists to expand its reach.

(2) No federal statute explicitly grants to tribal authorities the power to exercise criminal jurisdiction over nonmembers. 18 U.S.C. § 1152 does not exclude such a grant but it does not require it. Nor does existing case law require it.

(3) To subject nonmember Indians to tribal jurisdiction discriminates against the nonmember both actually and potentially. This discrimination is not justifiable.

I now shall address each of these positions in greater depth.

I.

RETAINED TRIBAL SOVEREIGNTY

To understand the scope of *United States v. Wheeler*, *supra*, it is helpful to point out that both *Oliphant v. Suquamish Indian Tribe*, *supra*, and *Wheeler* originated in this circuit and that each constituted a reversal of this circuit's prior decision. In *Oliphant*, this circuit extended

criminal tribal jurisdiction to non-Indians, while in *Wheeler* it made any conviction by a tribal court of any crime over which it had jurisdiction a bar to prosecution by the United States of the greater offense of which the tribally prosecuted lesser included offense was a part. The circuit court in *Wheeler* undoubtedly was influenced by the expansion of tribal authority recognized by *Oliphant*. To reach its result in *Wheeler*, this court reasoned that the United States and the Navajo Tribe should not be treated as dual sovereigns for double jeopardy purposes.

It was this proposition against which much of the Supreme Court's opinion in *Wheeler* is directed. It must be remembered that the Court no doubt considered *Wheeler* and *Oliphant* contemporaneously because they were argued within two days and decided within sixteen days of one another. Having decided *Oliphant* by rejecting the expansion of the authority of tribal courts over crimes by non-Indians, it would not have been surprising to have found the Court in *Wheeler* using "non-Indians" as the limit of the reach of the "retained sovereignty" upon which it relied in *Wheeler*. It could have done so by referring to past tribal practices which many assert drew no distinctions between members and nonmembers insofar as punishment for crimes on the reservation were concerned.

It did not do so, however. Throughout the opinion the focus is upon the tribe's retained sovereignty with respect to its *members*. Two examples of this focus are as follows:

> Moreover, the sovereign power of a tribe to prosecute its *members* for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers* of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–668 [94 S.Ct. 772, 777–778]; *Johnson v. M'Intosh*, 8 Wheat. 543, 574 [5 L.Ed. 681]. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559 [8 L.Ed. 483]; *Cherokee Nation v. Georgia*, 5 Pet., at 17–18; *Fletcher v. Peck*, 6 Cranch 87, 147 [3 L.Ed. 162] (Johnson, J., concurring). And, as we have recently held, they cannot try *nonmembers* in tribal courts. *Oliphant v. Suquamish Indian Tribe*, *ante*, [435 U.S.] p. 191 [98 S.Ct. p. 1011].
>
> 435 U.S. at 326, 98 S.Ct. at 1087 (emphasis added).
>
> In sum, the power to punish offenses against tribal law committed by Tribe *members*, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.

Id. at 328, 98 S.Ct. at 1088 (emphasis added) (footnotes omitted). Others appear in the margin.[1]

1. It is undisputed that Indian tribes have power to enforce their criminal laws against *tribe members*. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain "a separate people with the power of regulating their internal and social relations." *United States v. Kagama*, *supra*, 118 U.S. at 381–382, 6 S.Ct. at 1112–1113; *Cherokee Nation v. Georgia*, 5 Pet. 1, 16, 80 L.Ed. 25. Their right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions. *United States v. Antelope*, 430 U.S. 641, 643 n. 2, 97 S.Ct. 1395, 1397 n. 2; *Talton v. Mayes*, 163 U.S. 376, 380, 16 S.Ct. 986, 988, 41 L.Ed. 196; *Ex parte Crow Dog*, 109 U.S. 556, 571–572, 3 S.Ct. 396, 405–406, 27 L.Ed. 1030 (1883); see 18 U.S.C. § 1152 (1976 ed.); *infra*, n. 21.

435 U.S. at 322, 98 S.Ct. at 1085 (emphasis added) (footnote omitted).

The Indian tribes are "distinct political communities" with their own mores and laws, *Worcester v. Georgia*, 6 Pet., at 557; *The Kansas Indians*, 5 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means.

The lesson to be drawn appears to me to be clear. Retained tribal sovereignty exists with respect to members only. What powers over nonmembers, Indian or not, that exist have their source in federal law be it an act of Congress, a federal court decision, or an administrative decree of a federal agency. While the decision of the majority will clothe some tribes with authority to subject nonmember Indians to its criminal jurisdiction, it is clear that its source is not retained jurisdiction, but rather the court's mandate. The upshot is that the majority wishes to enhance slightly tribal powers while I do not.

II.

DO FEDERAL STATUTES GRANT TO TRIBES POWER TO IMPOSE CRIMINAL PUNISHMENT ON NONMEMBER INDIANS?

The majority devotes substantial space to arguing that federal statutes have given tribal courts the power to subject nonmember Indians to its criminal jurisdiction. *See* pp. 12-16 [Brunetti draft]. It asserts that certain cases have assumed that such jurisdiction exists and that "the structure of criminal jurisdiction in Indian country," p. 14[B.d.], also suggests that this is true.

I shall address each case cited by the majority. Only a portion of a sentence appearing in *United States v. Antelope*, 430 U.S. 6 1, 642, 97 S.Ct. 1395, 1396, 51 L.Ed.2d 701 (1977), was quoted by the majority, apparently to make the point that federal criminal statutes focus on "Indians" without the qualifier "tribal member" or "non-tribal member." The full sentence is:

> The question presented by our grant of certiorari is whether, under the circumstances of this case, federal criminal statutes violate the Due Process Clause of the Fifth Amendment by subjecting individuals to federal prosecution by virtue of their status as Indians.

The "circumstances of this case" were that members of the Coeur d'Alene tribe murdered a non-Indian in the Coeur d'Alene reservation and sought to be tried under Idaho law rather than federal law pursuant to the Major Crimes Act, 18 U.S.C. § 1153.[2] The Court rejected the defendants' constitutional argument. It was not necessary to address whether any distinction between members of the Coeur d'Alene tribe and nonmembers existed. To have said each time the word "Indians" was used, "including both members and nonmembers," would have been absurd. The case simply is not relevant to the issue before us.

The majority itself recognized the marginal significance of *United States v. Heath*, 509 F.2d 16 (9th Cir.1974), to the issue before us. I would go further and assert that it has no relevance whatsoever. The issues before the court in *Heath* were whether the United States could indict an Indian of a terminated tribe under the Major Crimes Act, 18 U.S.C. § 1153,[2] and, if

> They have a significant interest in maintaining orderly relations among their *members* and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. *See Ex parte Crow Dog*, 109 U.S. at 571 [3 S.Ct. at 405].
>
> Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its *members* for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests.

Id. at 331-32, 98 S.Ct. at 1090-91 (emphasis added) (footnotes omitted).

2. 18 U.S.C. § 1153 reads in relevant part as follows:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.

not, whether the attempt to do so was prejudicial error when the crime charged was murder, as defined in 18 U.S.C. § 1111, and committed in "Indian country" and, thus, subject to federal jurisdiction under the Federal Enclaves Act, 18 U.S.C. § 1152.[3] This court held that the defendant, as an Indian of a terminated tribe, must be treated as any other non-Indian citizen of the state. As a result, 18 U.S.C. § 1153 could not provide a basis for federal jurisdiction. It applies, this court held, only when the "Indian who commits [certain crimes] against the person or property of another Indian or other person," § 1153, is an Indian as to whom the United States has a "special responsibility." *Heath*, 509 F.2d at 19. A person, who happens to be an Indian and was once a member of a now terminated tribe, could have been indicted, as could have been any other person, under 18 U.S.C. § 1152. The court concluded that under these circumstances the indictment under 18 U.S.C. § 1153 was not prejudicial error.

The issue of tribal court jurisdiction over a nonmember Indian was irrelevant to the question that *Heath* raised. Had the *Heath* court believed that the tribal court had criminal jurisdiction over a nonmember it would have affected neither its reasoning nor its result. The crucial issue, as seen by *Heath*, was whether the United States had a "special responsibility" with regard to the defendant, not whether the defendant was a member of the victim's tribe. The majority says it did not occur to the *Heath* court to suggest "that federal jurisdiction is lacking because the Klamath [the defendant Indian] was on the reservation of the Warm Springs Tribe, where he enjoyed no tribal relationship." [B draft p. 3] Of course, it did not. It was irrelevant. To overlook an issue that could have been controlling is significant; to refrain from addressing one that is irrelevant only mercifully saves both the reader's eyes and time.

The majority's use of *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir.1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970), is a bit closer to the mark at which it is shooting. Unfortunately, a miss is a miss, however. This court, in holding that the Navajo Tribe need not accede to Arizona's effort to extradite a Cheyenne Indian resident on their reservation to the State of Oklahoma, emphasized the retained sovereignty of the Tribe. We pointed to the Treaty of 1868, the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), the codification of the Navajo Tribe's extradition responsibilities in its Tribal Code, and the approval of that Code by the Commissioner of Indian Affairs. None of those sources of law required the Tribe to accede to Arizona's request. Indeed, the Tribal Code expressly precluded any such accession.

The case, therefore, is consistent with the existence of substantial retained sovereignty and for the purposes of the case treated members and nonmembers the same. This similarity of treatment was rooted in the 1868 Treaty that spoke of "bad men among the Indians," who committed wrongs against anyone "subject to the authority of the United States," a group that undoubtedly includes, from time to time, whites as well as nonmember Indians. But it goes no further. It simply does not address the jurisdiction of the Navajo Tribe to subject nonmembers to criminal prosecution. If one repeats "tribal sovereignty" over and over again, the hypnotic power of the phrase may lead one to conclude that such jurisdiction in a given situation exists. Reasoning, not self-hypnosis, is the way of the law, however.

3. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

11 U.S.C. § 1152.

Enough has been said to suggest that neither 18 U.S.C. § 1152 nor 18 U.S.C. § 1153 compel the conclusion which the majority reached. The latter, the Major Crimes Act, draws into federal court "any Indian" who commits certain crimes within "Indian country." Membership within the tribe occupying the country in which the crime occurs is irrelevant. It says nothing, I repeat, about the jurisdiction of a tribal court to prosecute criminally a nonmember who commits a crime over which the tribe has jurisdiction.

The Federal Enclaves Act, 18 U.S.C. § 1152, also does not unequivocally support the majority. Its principal purpose is to extend to "Indian country" the general laws of the United States. The reach of those laws within "Indian country" clearly is unaffected by whether the offender is an Indian or a non-Indian. *See Mull v. United States*, 402 F.2d 571, 573 (9th Cir.1968), *cert. denied*, 393 U.S. 1107, 89 S.Ct. 917, 21 L.Ed.2d 804 (1969). On its face, 18 U.S.C. § 1152 also would appear not to draw a distinction between a victim who is Indian and one who is not. However, it has been long established that the statute does not embrace an offense by a non-Indian against a non-Indian even when committed in Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 869, 26 L.Ed. 869 (1882); *see New York ex rel. Ray v. Martin*, 326 U.S. 496, 500, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Mull v. United States*, 402 F.2d at 573.

An offense by an Indian against a non-Indian, on the other hand, is within the statute. *See United States v. Burland*, 441 F.2d 1199, 1203 (9th Cir.), *cert. denied*, 404 U.S. 842, 92 S.Ct. 137, 30 L.Ed.2d 77 (1971). And it is true, as *Burland* holds, that the Indian offender need not have committed his crime within the reservation limits of the tribe of which he is a member. *Cf. United States v. Kagama*, 118 U.S. 375, 382, 6 S.Ct. 1109, 1113, 30 L.Ed. 228, 231 (1885). All that is necessary is that it have been committed in "Indian country."

The position of the majority emerges in its most forceful form when the focus is fixed upon the exceptions to 18 U.S.C. § 1152. These are (1) "offenses committed by one Indian against the person or property of another Indian," (2) "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe," and (3) any offense where by treaty exclusive jurisdiction "is or may be secured to the Indian tribes respectively." Only the first would be affected by taking *Wheeler* at its word and rejecting the position of the majority. In essence, the majority argues that because there is no explicit provision for relieving the nonmember Indian from tribal jurisdiction in the first exception, he must be subject to the tribe's criminal jurisdiction. It buttresses this by pointing out, as already indicated, that 18 U.S.C. § 1152 is applicable generally without regard to whether the offender was a member of the Tribe on whose reservation the offense was committed. Thus, tribal membership, it argues, also should be irrelevant in applying the exception.

The conclusion does not follow. To disregard membership in construing the broad reach of 18 U.S.C. § 1152 *protects* Indians from possible discrimination by state courts; to disregard it construing the exception to its broad reach serves only to *enhance* the possibility of discrimination by the tribal court against a nonmember Indian. Only an incurable romantic would argue that only discrimination by state courts can exist. Finally, there is no more reason to treat the literal language of the statute as all encompassing than there was in the case of the non-Indian offense against the non-Indian. *See McBratney*, 104 U.S. 869; *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307.

I acknowledge that the exclusion of nonmember Indians from the jurisdiction of tribal courts will impose somewhat greater responsibilities on certain United States Attorneys.[4] Nonmember offenses not directed at another Indian, and not described in the Major Crimes Act, 11 U.S.C. § 1153, must be prosecuted by these officials.

4. And possibly on state prosecutors if, as has been suggested by some, "victimless" crimes by non-Indians (and nonmember Indians by the reasoning of the dissent) fall within the exclusive jurisdiction of state courts. *See* 3 Op. Off. Legal Counsel 111 (1979).

This category embraces such things as drunk and disorderly conduct.

The majority also suggests that state prosecutors and state courts may become involved in law enforcement. This concern appears to be premised on the assumption that an offense by a nonmember Indian against another Indian, which is not a major crime, would not be covered by 18 U.S.C. § 1152 were my view to prevail. Thus, the majority suggests state law enforcement would be required to fill the gap.

I suggest the majority has misread 18 U.S.C. § 1152. To exclude nonmember Indians from the Indian-against-Indian exception merely places the nonmember in the same position as a non-Indian, or an Indian for whom, as in *Heath*, the federal government has no "special responsibility." Both are subject to "sole and exclusive jurisdiction of the United States." There is no reason why a nonmember should be treated differently. To the extent the offense each commits is not proscribed by federal law, the Assimilative Crimes Act, 18 U.S.C. § 13, will import the applicable state law to be applied by federal authorities and courts.

The fear of the majority can be put this way. As they see it, an offense which is not a major one by an Indian against an Indian is excluded from federal jurisdiction when tribal jurisdiction is lacking because the offender is a nonmember. I suggest that under those circumstances the offense "escapes" the first exception to the general rule of 18 U.S.C. § 1152 but does not "escape" the broad reach of 18 U.S.C. § 1152. That is, the offense remains an offense by an Indian within Indian country and thus subject to the general laws of the United States, but, for the reason stated here, should not be considered as one committed by one Indian against another within the meaning of the first exception to 18 U.S.C. § 1152. Put more simply, the nonmember Indian should be treated as a non-Indian.

III.

DISCRIMINATION AGAINST THE NONMEMBER INDIAN

In my original dissent, I lumped all the discriminatory possibilities to which the majority subjected the nonmember Indian under the heading of equal protection. The majority in its original and revised opinion addresses the equal protection issue and concludes that there is a rational basis for subjecting the nonmember to tribal jurisdiction and that, in any event, in this case Duro is not being discriminated against on the basis of race.

On reflection, I have concluded that it is not essential to my position to fit the facts of this case to the analytics of the equal protection doctrines. Rather, I have employed the discriminatory possibilities this case suggests to inform my interpretation of the applicable statutes and cases. These possibilities may, but need not, rise to the level of equal protection violations. Their existence suggests, however, that wise construction of the applicable law should reduce, if not eliminate, their existence.

The heart of the issue this case presents, as this dissent already has stated, is that the majority puts the offending nonmember Indian in a position different from, and less advantageous than, that of any other class of offender. The member Indian offender is "among his own," which presumably is frequently to his benefit. The non-Indian is protected by *Oliphant*, *supra*, from possibly harsh treatment by a tribal court animated by a bias against all non-Indians. And the Indian no longer enjoying the "special relationship" with the federal government enjoys the same protection as does the non-Indian. Only the nonmember Indian still enjoying that "special relationship" must be subject to a tribunal that, on its face, suggests the possibility of prejudice against him.

It is not beyond the pale of proper judicial behavior to employ an interpretation of the law that eliminates this possibility. In the final analysis, the majority has suggested only two rather weak reasons for not doing so, viz., to enhance tribal sovereignty and to avoid burdening U.S. Attorneys and their staffs. Inasmuch as the contribution to these ends made by the majority's approach is only marginal at

best, I would hold that the price demanded for these modest achievements is too high. Tribes would lose no meaningful sovereignty under my analysis nor would U.S. Attorneys become overburdened.

I respectfully dissent.

NORTHERN CHEYENNE TRIBE, Plaintiff-Appellant,

v.

Donald P. HODEL, Secretary of the Interior, et al., Defendants-Appellees,

Western Energy Co.; Wesco Resources, Inc.; and Thermal Energy, Inc., Defendants-Intervenors-Appellees.

No. 86-4389.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 10, 1987.

Decided March 15, 1988.

As Amended July 11, 1988.

Indian tribe sought to enjoin the Secretary of the Interior from proceeding with federal coal leases without complying with federal law. The United States District Court, District of Montana, James F. Battin, Chief District Judge, granted tribe summary judgment and issued injunction voiding leases as being in violation of the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of tribe. The Secretary moved to amend judgment and the District Court amended its injunction to suspend, rather than void, the leases. Tribe appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) the Secretary's motion gave the District Court power to amend the judgment; (2) finding that leases violated federal law did not mandate issuance of injunction; (3) the District Court abused its discretion by failing to consider public interest before amending injunction; and (4) the District Court abused its discretion by failing to order the Secretary to comply with his own regulations concerning competitive leasing of federal coal rights.

Reversed and remanded with instructions.

Opinion superseded, 842 F.2d 224.

1. **Federal Civil Procedure ⇐2643**

Motion to alter or amend judgment gave district court power to amend judgment which had voided federal coal leases on grounds that leases violated the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of Indian tribe. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Mineral Lands Leasing Act, § 2 et seq., 30 U.S.C.A. § 201 et seq.

2. **Federal Civil Procedure ⇐2658**

Ten-day limitation contained in rule concerning motions to alter or amend judgments has to be strictly construed. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

3. **Federal Civil Procedure ⇐2658**

Motion for "modification of relief" filed by coal lessee was not motion to alter or amend judgment, and thus, was not subject to ten-day limitation; rather, motion was timely response to lessor's motion to amend judgment, which voided federal coal leases on grounds that leases violated the National Environmental Policy Act, the Federal Coal Leasing Amendments Act, and the responsibilities of the United States as trustee of Indian tribe. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Mineral Lands Leasing Act § 2 et seq., 30 U.S.C.A. § 201 et seq.

F.2d 348 (8th Cir.1984), and *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir.1987), travel time must be compensated at the same hourly rate as other work. In *Cruik*, however, we simply said that the district court's award of fees for travel time at the full rate was not unreasonable on the particular facts there before us. *Cruik*, 738 F.2d at 350-51. And in *Rose* we said that the district court should "award fees at the full hourly rate ... *unless* it determine[d] in its discretion that such a recovery would be unreasonable." *Rose*, 816 F.2d at 396 (emphasis added). Neither case holds that fees for travel time must always be awarded at the full hourly rate. The District Court concluded that the rate for travel time should be lower in this case and we do not find that decision to run afoul of applicable law or to be unreasonable.

The order of the District Court is AFFIRMED.

Albert DURO, Petitioner-Appellee,

v.

Edward REINA, Chief of Police, Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community, et al., Respondents-Appellants.

No. 85-1718.

United States Court of Appeals, Ninth Circuit.

Nov. 2, 1988.

Appeal from the United States District Court for the District of Arizona.

Richard B. Wilks, Phoenix, Ariz., for respondents-appellants.

John Trebon, Phoenix, Ariz., for petitioner-appellee.

Rodney B. Lewis, Sacaton, Ariz., Edward G. Maloney, Jr., Seattle, Wash., for amici curiae.

Before CHOY, SNEED and BRUNETTI, Circuit Judges.

ORDER

Judge Choy and Judge Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Sneed has voted to grant the petition for rehearing and recommends accepting the suggestion for a rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. Fed.R.App.P. 35(b). A majority of the judges voted against en banc consideration. Judge Kozinski's dissent from the order denying rehearing en banc is attached.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KOZINSKI, Circuit Judge, with whom LEAVY and TROTT, Circuit Judges, join, dissenting from the order denying rehearing en banc.

In attempting to navigate what it calls "the uncharted reaches of tribal jurisdiction," *Duro v. Reina*, 851 F.2d 1136, 1139 (9th Cir.1988), a panel of our court has cast off the map and the compass. The panel's holding—that a tribal court may exercise criminal jurisdiction over Indians who are not members of the tribe—overlooks clear Supreme Court pronouncements to the contrary, is at odds with current equal protection analysis, creates an irreconcilable conflict with the Eighth Circuit and potentially subjects criminal defendants to biased tribunals. This is a serious matter deserving serious attention. I therefore respectfully dissent from the order denying rehearing en banc.

I

Petitioner Albert Duro is a member of the Torrez-Martinez band of Mission Indians. From March 1984 to June 1984, Duro

lived on the Salt River Indian Reservation, the home of the Salt River Pima-Maricopa Indian Community, a tribe in which Duro is ineligible for membership. While on the Salt River Reservation, Duro allegedly shot and killed a fourteen year old boy. Criminal complaints against Duro were filed in both federal district court and the Salt River Pima-Maricopa Indian Community Court.

The panel holds that the tribal court has criminal jurisdiction over Duro, a member of a wholly different tribe, simply because he is an Indian. As discussed more fully below, this one-Indian-is-just-like-another-Indian approach to tribal jurisdiction is seriously misguided.

II

A. *Disregard of Supreme Court Authority*

The panel laments the lack of Supreme Court guidance on the question before it and is "perplexed by the [ ] ambiguities in the historical record." 851 F.2d at 1142. The panel's perplexity grows out of its failure to consider or discuss the Supreme Court cases most directly on point, its insistence on labelling relevant statements in other Supreme Court cases as dicta and its reluctance to accept the guidance clearly offered in the Supreme Court cases on which it does rely. The fact of the matter is that the Supreme Court has charted a clear course through these waters, a course that the Eighth Circuit had no difficulty following. *Greywater v. Joshua*, 846 F.2d 486 (8th Cir.1988).

The course starts with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), where the Court held that tribes could not exercise criminal jurisdiction over non-Indians.[1] Standing alone, *Oliphant* leaves open the possibility that tribal courts might exercise criminal jurisdiction over Indians who are not members of the forum tribe. A series of subsequent decisions have elaborated on *Oliphant*, however, effectively foreclosing this possibility.

Only two weeks after *Oliphant* the Court decided *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). *Wheeler* raised the question whether the defendant (a member of the Navajo tribe) could be tried in federal court after the Navajo tribal court had convicted him for the same conduct. To resolve this question, the Supreme Court had to examine the source of the tribe's authority over Wheeler.[2] The Court concluded that the jurisdiction derived from the tribe's retained authority, i.e., that aspect of the tribe's sovereignty it had not given up by virtue of incorporation into the United States. In reaching this conclusion, the Court drew a sharp distinction between those sovereign powers the tribe had surrendered and those it had not:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe* .... But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 326, 98 S.Ct. at 1087 (emphasis added). Speaking precisely to the issue presented in our case, the Court stated: "And, as we have recently held, [the tribes] cannot try nonmembers in tribal courts." *Id.* (citing *Oliphant*, 435 U.S. at 191, 98 S.Ct. at 1011).

Admittedly, this last statement in *Wheeler* is dictum. But it is dictum of a most unusual and persuasive sort: It is the Supreme Court's characterization of its holding in a case it had decided only two weeks earlier. More important, when cited by the Court in support of its analysis in *Wheeler*, it is the only characterization of *Oliphant* that makes sense. As the Eighth Circuit recognized, "[t]he *Wheeler* Court's analysis distinguishing nonmember Indians from tribal members was not inadvertent. Its very analysis requires such distinction." *Greywater*, 846 F.2d at 491. If the tribe's criminal jurisdiction is derived from its power to control relations among its own members, that power cannot extend to anyone who is not a member of the tribe. The result reached by the panel in our case simply cannot be squared with *Oliphant* and *Wheeler*.[3]

But *Oliphant* and *Wheeler* were only the first manifestations of the Court's emerging theory limiting tribal jurisdiction to members of the tribe. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court considered whether a state could impose various state taxes on cigarettes and other items sold by tribal enterprises on the reservation. The Court held that the state could properly tax sales to nonmembers of the tribe, but not sales to members. Most important, the Court addressed the issue—crucial in our case—of the status of the Indians who were not members of the tribe in question:

> [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U.S.C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.
>
> Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. *For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.* There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.

Id. at 161 100 S.Ct. at 2085 (emphasis added); *see also id.* at 187, 100 S.Ct. at 2098 (Rehnquist, J., concurring in part) ("[t]he fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share"). Although the Court was discussing a tribe's immunity from taxation, not its criminal jurisdiction, the Court was clearly drawing on a broader theory of tribal sovereignty: A tribe acts as a sovereign only with respect to its own members.

1. The panel correctly notes that *Oliphant* has been widely criticized. 851 F.2d at 1142 n. 5. *See* Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1987 Wis.L.Rev. 219, 267–74; Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479 (1979); Barsh & Henderson, *The Betrayal*: Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 Minn.L.Rev. 609 (1979). Yet *Oliphant* remains law and continues to be, at least in the Supreme Court's view, the progenitor of a series of tribal jurisdiction decisions. The panel may well be right in joining the chorus, 851 F.2d at 1141–42, but academic criticism, no matter how strong, cannot overrule a decision of the Supreme Court.

2. The source of the authority was crucial for double jeopardy purposes: If the tribe derived its authority from Congress, the defendant would face double jeopardy because both prosecutions would be on behalf of the same sovereign. *See Puerto Rico v. Shell Co.*, 302 U.S. 253, 264, 58 S.Ct. 167, 172, 82 L.Ed. 235 (1937) (double jeopardy clause bars successive prosecutions by federal and territorial courts because they are "creations emanating from the same sovereignty"); *Waller v. Florida*, 397 U.S. 387, 393, 90 S.Ct. 1184, 1187, 25 L.Ed.2d 435 (1970) (barring successive prosecutions by a city and by the state of which the city is a political subdivision). If the sources were different (as in the case of separate state and federal prosecutions), then the double jeopardy clause would not bar subsequent prosecution by the United States. *See Wheeler*, 435 U.S. at 329–30, 98 S.Ct. at 1089–90.

3. The majority minimizes *Wheeler* by describing its use of the term "nonmember" as "indiscriminate." 851 F.2d at 1140. The fact that the Court refers to both nonmembers and non-Indians in some of its opinions does not, however, reveal sloppy thinking or the random use of language. When the Court merely describes the facts presented by *Oliphant* or other cases, it usually employs the term non-Indian. *See, e.g., Montana v. United States*, 450 U.S. 544, 565–66, 101 S.Ct. 1245, 1258–59, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980). When it discusses its *rationale*, the Court repeatedly distinguishes along the line of tribal membership and not race. *See, e.g., Montana*, 450 U.S. at 563–64, 101 S.Ct. at 1257–58; *Colville*, 447 U.S. at 155–61, 100 S.Ct. at 2082–85.

The panel disregards *Colville*, just as it disregards *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), where the Court provided its most explicit statement yet as to the boundaries of tribal sovereignty. *Montana* draws a clear distinction between a tribe's power over its own members and its power over nonmembers. At issue was whether a tribe could prohibit hunting and fishing by nonmembers on reservation land not owned by the tribe. Applying the principles announced in *Wheeler*, the Court concluded that the tribe could not prohibit such activities:

> Thus, *in addition to the power to punish tribal offenders*, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.*

Id. at 564, 101 S.Ct. at 1257 (emphasis added; citations omitted). Significantly, the Court viewed its conclusion as flowing from the rationale of *Oliphant*: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.*" *Id.* at 565, 101 S.Ct. at 1258 (emphasis added; footnote omitted). The exercise of criminal jurisdiction is plainly an "inherent sovereign power."

As the Eighth Circuit recognized, in seeking guidance from the Supreme Court, we must do more than look at words and phrases; we must analyze concepts and principles. A sister circuit has done so and come to the conclusion that tribal courts may not assert criminal jurisdiction over Indians who are not members of the tribe. *Greywater* draws a map of the Supreme Court law on this subject, carefully highlighting all the significant landmarks. If we interpret the map differently, if we read the Supreme Court cases as charting another course, so be it. But we then have a responsibility to explain our reasoning. Dismissing some Supreme Court cases which our sister circuit found dispositive as "casual references" deserving "little weight," 851 F.2d at 1141, while overlooking others altogether, is inappropriate.[4]

4. The panel also asserts that if tribal courts do not have jurisdiction "there will be a jurisdiction void," because state authorities will fail to fill the gap. 851 F.2d at 1146. I find the prediction by a federal court of appeals that state authorities within the circuit will abdicate their responsibility to enforce the criminal law troubling on its face. The states already exercise exclusive jurisdiction over similar offenses (both violent and victimless) committed on the reservation involving solely non-Indian defendants and victims. *See* F. Cohen, *Handbook of Federal Indian Law* 352-53 & n. 47 (1982 ed.). The panel suggests no reason why states would treat crimes by Indian nonmembers differently from the same crimes committed by nonmembers belonging to any other racial group. Any such disparate treatment would violate the equal protection clause of the fourteenth amendment, subjecting state officials to liability under 42 U.S.C. § 1983 (1982). *See Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (state officials liable under section 1983 where they know or should know that their conduct violates a clearly established constitutional right); *Smith v. Ross*, 482 F.2d 33, 36 (6th Cir.1973) (per curiam) (law enforcement officers may be liable under section 1983 for failure to enforce the law equally and fairly); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to single out Indians in ways "that might otherwise be constitutionally offensive"). The panel cites no support for its proposition.

The far more plausible assumption is that states would exercise their jurisdiction fully and responsibly. Non-Indian residents of reservations apparently outnumber nonmember Indian residents by a substantial margin. Amended Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc at 9-10; *see Greywater*, 846 F.2d at 493. The states would therefore experience only a marginal increase in law enforcement responsibilities on the reservation. Moreover, some tribes already restrict their own criminal jurisdiction to tribal members. *See, e.g., Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 & n. 4 (9th Cir.1976) (declining to rule on whether the tribe has inherent power to assert criminal jurisdiction over nonmembers because tribal constitution permits criminal jurisdiction only over members); Cohen, *supra* note 5, at 357 n. 77 ("[o]ther tribes have laws restricting tribal jurisdiction to members"). Presumably some authority steps in to fill the jurisdictional void created in such cases; the states are a logical choice. *See id.* at 357 n. 79 ("[w]hen a tribe confines its jurisdiction to its own members, state jurisdiction may be correspondingly broader"); *Greywater*, 846 F.2d at 490 n. 3 ("Petitioners were also charged with criminal misdemeanor violations under state law for the offenses arising out of the same incident.").

B. *Equal Protection*

Another very troubling aspect of the panel's opinion is its handling of Duro's equal protection claim. Duro argues that, by asserting jurisdiction over Indians but not over non-Indians, the tribe has violated the equal protection clause of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8) (1982 & Supp. IV 1986). While a distinction based solely on tribal membership could be sustained on a rational basis alone, Duro contends that the distinction in this case is based on race and does not survive strict scrutiny. The panel rejects this argument and, in doing so, makes two fundamental errors. First, the majority relies on cases holding that *Congress* need not have a compelling governmental interest in enacting statutes that discriminate between Indians and non-Indians in order to survive an equal protection challenge. *See United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (federal jurisdiction over Indian defendants under Major Crimes Act, 18 U.S.C. § 1153); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (Bureau of Indian Affairs employment preference for enrolled Indians). These cases are inapposite where there is no congressional pronouncement on the issue and the tribe is exercising its retained sovereignty. Second, the panel holds that the classification in question is not racial at all because race is merely one of several factors that go into drawing the distinction at issue. This holding cannot be squared with established principles of equal protection.

The considerations that led the Court to uphold congressional Indian/non-Indian distinctions are irrelevant where, as here, Congress has not acted. The Constitution has been interpreted as granting Congress "plenary power . . . to deal with the special problems of Indians." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483; *see Antelope*, 430 U.S. at 645, 97 S.Ct. at 1898; U.S. Const. art. I, § 8. Moreover, congressional enactments affording special treatment to Indian tribes and their members are based on a long "history of treaties and the assumption of a 'guardian-ward' status." *Mancari*, 417 U.S. at 551, 94 S.Ct. at 2483. Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians". . . .'" *Antelope*, 430 U.S. at 646, 97 S.Ct. at 1399 (quoting *Mancari*, 417 U.S. at 553 n. 24, 94 S.Ct. at 2484 n. 24); *see also Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484 (BIA preference "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S.Ct. 943, 948, 47 L.Ed.2d 106 (1976) (exclusive tribal court jurisdiction is based on "quasi-sovereign status" of tribe, not race of party).

When Congress acts, it must reconcile two somewhat inconsistent constitutional provisions: the fifth amendment's implicit guarantee of equal protection and article I, section 8's grant of power to legislate with respect to Indians. The more specific constitutional authorization as to Indians must temper the application of equal protection principles, lest the whole body of federal Indian law be wiped off the books. *Mancari*, 417 U.S. at 552, 94 S.Ct. at 2483; *see id.* at 555, 94 S.Ct. at 2485 (permitting special treatment of Indians so long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

On the other hand, the Court has never held that a *tribe* may exercise its authority in a racially discriminatory manner. As the Court held in *Wheeler*, Indian tribes derive their power to conduct criminal tri-

als not from Congress but from their own retained sovereignty. The two are quite different. Indian tribes may no more discriminate on the basis of race than may a state. *Cf. Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979) (states do not share Congress's power to "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive"). The panel's holding that they may is without precedent or authority.

More disturbing still, the panel holds that the distinction based on Indian status is not a racial classification because factors other than race are taken into account 851 F.2d at 1144. While this may be true when the distinction is made by *Congress*, *United States v. Antelope*, 430 U.S. at 645, 97 S.Ct. at 1398, it is most definitely not true when the distinction is made by a tribe. A tribe is a government entity. *See Wheeler*, 435 U.S. at 322–23, 98 S.Ct. at 1085–86. A government entity may not avoid strict scrutiny of a policy that discriminates against blacks, for example, by arguing that race was only one of many considerations. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264–66, 97 S.Ct. 555, 562–63, 50 L.Ed. 2d 450 (1977). Either race was considered in the decision, in which case strict scrutiny is invoked, or race was not considered, in which case the rational basis standard applies. You can't have it both ways. In suggesting that government entities may avoid the strict scrutiny of the courts by amalgamating racial classifications with other factors, the opinion takes a giant step backward in equal protection analysis. It is an unwise step, one long foreclosed by the Supreme Court. *See id.* (racially discriminatory factor need not be sole or even dominant concern to invoke strict scrutiny); *see also* L. Tribe, *American Constitutional Law* § 16–14, at 1472 (2d ed. 1988) ("any state or federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny...."). Under strict scrutiny, it is difficult to perceive a state interest so compelling as to force Indians (but not non-Indians) to submit to the criminal jurisdiction of tribes to which they do not belong.[5]

C. *Potential for Biased Tribunals*

There is yet another troubling aspect of the opinion: its failure to address or even consider the possibility that it may be subjecting Duro to adjudication by a biased tribunal. Judge Sneed, in dissent, gave the subject thoughtful attention. 851 F.2d at 1151–52 (Sneed, J., dissenting). The *Greywater* panel thought the matter significant enough to merit discussion:

> As a final note, we believe our decision is supported by the fact that, based upon the record, there are significant racial, cultural, and legal differences between the Devils Lake Sioux Tribe and the Turtle Mountain Band of Chippewa Indians. These nonmember Indian Petitioners thus face the same fear of discrimination faced by the non-Indian petitioners in *Oliphant*: they would be judged by a court system that precludes their participation, according to the law of a societal state that has been made for others and not for them.

Greywater, 846 F.2d at 493. The *Duro* majority ignores the subject.

Indian tribes differ in material respects from political entities to which we are accustomed. They have broad authority to determine the qualifications for membership, which often are based on degree of tribal blood. Cohen, *supra* note 5, at 20–23. To be eligible for membership in the Salt River Pima-Maricopa Indian Community, a person must not be a member of another tribe. Salt River Pima-Maricopa Community Const. art. II, § 1; Salt River Pima-Maricopa Community Code § 2-1(a) (Supp. No. 2). As noted, Duro is thus ineligible for membership in the community which will decide his fate. The exclusion of otherwise eligible individuals who belong to another tribe underscores the possibility that those who do not qualify for tribal membership may be treated in an unfair or discriminatory fashion. Indeed, the possibility that there may be hostility or mistrust between Indian tribes is not a far-fetched concern. As reported in testimony given recently before the Civil Rights Commission, at least one such situation currently exists, giving rise to what many perceive as miscarriages of justice:

> I am here to address you concerning what I believe are serious violations under the Indian Civil Rights Act of individual Indian people subject to jurisdiction in a variety of situations, but most specifically in the situation where we now have some 15,000 Navajo people who have been placed under the jurisdiction of the Hopi Tribal Court because of [a] land dispute....
>
> It is my personal experience representing people in that tribal court that the relocation situation, the dispute as it exists between the two tribes, makes it impossible for Navajo people who are facing criminal charges as a result of that dispute to be tried fairly in that tribal court.... It is my personal experience that these individuals have experienced a violation of their ... right to trial by impartial jury....
>
> ....
>
> I have experienced two recent situations where Indian people, Navajo people, have been charged by the Hopi Tribe and brought into Hopi Tribal Court. We have made motions to dismiss based on the lack of jurisdiction, and we more importantly have raised the question of an impartial jury. Neither of my clients speaks Hopi; neither of my clients are from the Hopi Tribe; neither are allowed to participate in the Hopi Tribe.
>
> ....
>
> ... Hopi tribal members who sit on those juries—given the history of the land dispute, there is no way that they can leave that corridor of the courtroom and render a fair and impartial decision when sitting in front of them are people charged with crimes, including resisting that very Hopi Tribe's effort to remove them from their ancestral land.... [We] have people in those courtrooms who have stopped Hopi development projects because the Navajo believe it violates their religious freedom from having burial sites disturbed. They take that right into Hopi Tribal Court and have experienced an absolute vacuum in terms of a forum where they can have those rights impartially reviewed....

Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights (Aug. 13–14, 1987) at 219–20 (testimony of Lee Brook Phillips, attorney).

This case raises more than a theoretical legal question about which court has jurisdiction; it concerns criminal charges against an individual, Albert Duro. It also concerns other individuals who are or will be in Duro's situation, facing criminal charges in a court made up entirely of people belonging to another tribe, possibly a hostile one. In Judge Sneed's words, the panel's decision will be consigning such individuals "to a tribunal that, on its face, suggests the possibility of prejudice against [them]." 851 F.2d at 1151 (Sneed, J., dissenting).

III

Despite warnings from Judge Sneed's powerful and persuasive dissent, despite the unanimous decision of another circuit, the court today stands by a panel opinion that simply does not do justice to the sensi-

5. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978) suggested that, because tribes are sovereigns pre-existing the Constitution, they may be exempt from constitutional provisions (such as the fifth and fourteenth amendments) limiting the power of federal and state authorities. The equal protection provision of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), however, extends to any person within a tribe's jurisdiction. While ICRA's equal protection clause may not be coextensive with the constitutional equal protection clause, *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 237 (9th Cir.1976); *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1082 (8th Cir.1975), the panel analyzed Duro's equal protection claim under "the implicit equal protection guarantee of the Fifth Amendment," not under ICRA. 851 F.2d at 1144 n. 9. Even under ICRA, however, the majority's equal protection analysis would be erroneous, unless the equal protection offered by ICRA is so insubstantial that *Arlington Heights* would not apply.

tive and important issues presented to us. I respectfully dissent.

Jimmy NEUSCHAFER, Petitioner-Appellant,

v.

Harol WHITLEY; Attorney General for the State of Nevada, Respondents-Appellees.

No. 88-1688.

United States Court of Appeals, Ninth Circuit.

Argued Feb. 29, 1988.

Submitted May 6, 1988.

Decided Nov. 3, 1988.

State prisoner sought habeas corpus. The United States District Court for the District of Nevada, Edward C. Reed, Jr., Chief Judge, 674 F.Supp. 1418, dismissed and petitioner appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that petitioner's claim that he did not assert some of his claims in his first federal petition because they were unexhausted precluded a finding that he deliberately withheld those claims from his first federal petition and thereby abused the writ when he brought a second petition asserting those claims.

Reversed and remanded.

Chambers, Circuit Judge, filed a concurring opinion.

Alarcon, Circuit Judge, filed an opinion concurring in the result.

1. Habeas Corpus ⇐87

When petitioner has not exhausted his state remedies before filing a federal habeas petition, district court may hold that federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.)

2. Habeas Corpus ⇐113(12)

District court's decision to deny consideration on the merits of a petition for habeas corpus because it is abusive or successive is reviewed for abuse of discretion. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.)

3. Habeas Corpus ⇐7

"Abusive" habeas corpus petition raises grounds that were available but not raised in an earlier petition, whereas "successive" petition raises grounds identical to those in a prior petition; there are different standards that determine when a court may dismiss a petition as abusive and when it may dismiss one as successive. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.) 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ⇐7

Court abuses its discretion when it bases its decision to dismiss a habeas corpus petition as abusive or successive on an erroneous legal conclusion or on a clearly erroneous finding of fact. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially and one Judge concurring in the result.) 28 U.S.C.A. § 2244(b); Rules Governing § 2254 Cases, Rule 9, 28 U.S.C.A.

5. Habeas Corpus ⇐7

Federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner made a conscious decision deliberately to withhold them from a prior petition, is pursuing needlessly piecemeal litigation, or has raised claims only to vex, harass, or delay. (Per Cynthia Holcomb Hall, Circuit Judge, with one Judge concurring specially